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Bilateralism at the Service of Community Interests? Non-judicial Enforcement of Global Public Goods in the Context of Global Environmental Law

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Abstract

The interaction between bilateral and multilateral action is evolving in the context of ‘global environmental law’ – a concept that is emerging from the promotion of environmental protection as a global public good through a plurality of legal mechanisms relying on a plurality of legal orders. The notion of global public goods can thus help one better to understand recent bilateral initiatives aimed at supporting the implementation of multilateral environmental agreements and the decisions of their compliance mechanisms. Innovative linkages between the compliance system under the Convention on International Trade in Endangered Species and bilateral trade agreements recently concluded by the European Union and the US provide an example. Innovative opportunities for bilateral initiatives supporting the implementation of the 2010 Nagoya Protocol on Access and Benefit-sharing are likely to lead to even more complex inter-relationships between different legal orders. This new approach to bilateralism that aims to support the interests of the international community can be assessed in the context of earlier debates on unilateralism, with a view to emphasizing the role of international law in the identification and delivery of global public goods, and the role of global environmental law in understanding the interactions among a plurality of legal orders.

This article aims to discuss the usefulness of the literature on global public goods in relation to the plurality of legal orders and forms of non-judicial enforcement of international law. It will do so by relying on global environmental law as a concept that explains the promotion of environmental protection as a global public good through a plurality of legal mechanisms relying on a plurality of legal orders. To that end, it will focus on a *nouvelle vague* of

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bilateral initiatives spearheaded by the United States and the European Union (EU) that are specifically aimed to contribute to the implementation of multilateral environmental agreements – thus, putting bilateralism to the service of the international community – and to complement a specific feature of multilateral environmental agreements – their compliance mechanisms – as non-judicial approaches to enforcement issues.¹ In particular, I will refer to international biodiversity law as a testing ground that allows one to explore the plurality of legal orders. For present purposes, plurality of legal orders points to the development of law ‘within, outside and above the State’, as well as the increasing interactions and reciprocal influences between different regimes of international regulation, and creative patterns of interplay between national and international regulation.² Reference to plurality of legal orders will therefore also include expressions of plurality within the international legal order.³

Accordingly, the article will start with an introduction to global environmental law as a lens to focus on the links between international environmental law and the plurality of legal orders. It will then proceed with a discussion of the usefulness of the global public good literature to understanding developments in international and global environmental law. All these concepts will then be pulled together in relation to the non-judicial enforcement of multilateral environmental agreements by the compliance mechanisms established at the multilateral level and separate bilateral initiatives. These connections and their implications will be specifically tested in two scenarios: the first scenario consists of existing innovative links between the compliance system under the Convention on International Trade in Endangered Species (CITES)⁴ and bilateral trade agreements recently concluded by the EU and the US; secondly, a future scenario preliminarily identifies innovative opportunities for bilateral initiatives supporting the implementation of the 2010 Nagoya Protocol on Access and Benefit-sharing⁵ in an even more complex web of different legal orders. The article will conclude with an assessment of a new approach to bilateralism that aims to support the interests of the international community, placing it in the context of earlier debates on

¹ See generally Wolfrum, ‘Means of Compliance with and Enforcement of International Environmental Law’, 272 RdC (1998) 23; U. Beyerlin, P.T. Stoll, and R. Wolfrum (eds), *Ensuring Compliance with Multilateral Environmental Agreements* (2006); T. Treves *et al.* (eds), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (2009).

² Francioni, ‘Public and Private in the International Protection of Global Cultural Goods’, this issue.

³ As discussed by Schaffer in ‘International Law and Global Public Goods in a Legal Pluralist World’, this issue.

⁴ Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), 3 Mar. 1973, 993 UNTS 243.

⁵ Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, 29 Oct. 2010, UNEP/CBD/COP/DEC/X/1 (Nagoya Protocol), available at: www.cbd.int/abs/text/.

unilateralism, with a view to emphasizing the role of international law in the identification and delivery of global public goods, and the role of global environmental law in understanding the interactions among a plurality of legal orders to that end.

1 Global Environmental Law and the Plurality of Legal Orders

The concept of ‘global environmental law’ is increasingly used to challenge the inter-state paradigm of international environmental law. By focusing on issues of common interest to humanity as a whole, international environmental law has increasingly been characterized by a shift from a discretionary to a functional role of states (as protectors of the common interest of humanity) and the growing role of global institutions in international law-making.⁶ As a result, individuals and groups are identified as ‘beneficiaries’ (but not as ‘addressees’) of international environmental law: that is, international environmental law ‘formally addresses states’ but it assumes a global dimension in crucially ‘affect[ing] states and individuals and groups in society’.⁷

Global environmental law captures this evolving trait of international environmental law and places it in the context of interactions between a plurality of legal orders. Global environmental law is thus a ‘field of law that is international, national and transnational in character all at once’ and comprises ‘the set of legal principles developed by national, international and translational environmental regulatory systems to protect the environment and manage natural resources’ with a view to increasingly affecting private behaviour.⁸ Notably for present purposes, the emergence of global environmental law is considered a consequence of the ‘emerging recognition of global public goods’ in the environmental sphere⁹ and of the increasing public powers exercised by international organizations and other non-state actors in the supply of these goods.¹⁰

The interaction of different legal orders captured by global environmental law can be seen as the result of transplantation – the borrowing of legal principles and tools from the

⁶ Hey, ‘Common Interests and the (Re)constitution of the Public Space’, 39 *Environmental Policy and L* (2009) 152.

⁷ Hey, ‘Global Environmental Law and Global Institutions: A System Lacking “Good Process”’, in R. Pierik and W. Werner (eds), *Cosmopolitanism in Context: Perspectives from International Law and Political Theory* (2010), at 45, 50.

⁸ Yang and Percival, ‘The Emergence of Global Environmental Law’, 36 *Ecology LQ* (2009) 615.

⁹ *Ibid.*, at 626.

¹⁰ E. Hey, *Global Environmental Law* (2009). On the role of the private sector in international environmental law see E. Morgera, *Corporate Accountability in International Environmental Law* (2009).

national to the international level,¹¹ in addition to the adaptation of legal principles and tools from one country to another.¹² Global environmental law further accounts for convergence – the spontaneous similarities in legal responses in different countries to similar external pressures and the linking of national systems, which can be explained by the growing constraints imposed upon states by international environmental law¹³ and the expectations international environmental law creates in terms of implementation by private entities.¹⁴

While I am not persuaded that global environmental law is a separate area of law,¹⁵ the concept is certainly useful as a methodological framework and as a research and teaching agenda: it prompts the study of environmental law at the international, regional, and national levels as inter-related and mutually influencing systems, it encourages the use of comparative methods in that endeavour,¹⁶ and it calls for an analysis of the practice of non-state actors, particularly international organizations, international networks of experts providing advice on environmental legislation across the globe, international civil society, and the private sector.

The concept of global environmental law thus assists in understanding the ‘functional’ role of states and the ‘functionalization of national sovereignty’¹⁷ arising from the evolution of international environmental law in the context of the plurality of legal orders. States exercise ‘delegated powers in the interest of humankind’ rather than freely relying on their national sovereignty¹⁸ because international environmental law formulates their international responsibility at the service of the well-being of individuals and certain groups within their own territory, as well as of future generations, on the basis of the identification of certain environmental issues that are of common concern.¹⁹ Against this background, global environmental law then allows the exploration of the implications of the functional role of states under international environmental law in the interactions of international, national, and transnational law.

¹¹ Ellis, ‘General Principles and Comparative Law’, 22 *EJIL* (2011) 949; Wiener, ‘Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law’, 27 *Ecology LQ* (2001) 1295.

¹² A. Watson, *Legal Transplants: An Approach to Comparative Law* (1974).

¹³ Yang and Percival, *supra* note 8.

¹⁴ Hey, *supra* note 7, at 50.

¹⁵ As Yang and Percival, *supra* note 8, at 664, seem to suggest.

¹⁶ Albeit further study is needed to define specific methodological challenges in that respect: see Ellis, *supra* note 11; Wiener, *supra* note 11; Momirov and Naudé Fourie, ‘Vertical Comparative Law Methods: Tools for Conceptualising the International Rule of Law’, 2 *Erasmus L Rev* (2009) 291; Roberts, ‘Comparative International Law? The Role of National Courts in Creating and Enforcing International Law’, 60 *ICLQ* (2011) 57.

¹⁷ Francioni, *supra* note 2.

¹⁸ Dupuy, ‘Humanity and the Environment’, 2 *Colorado J Int’l Environmental L & Policy* (1991) 203.

¹⁹ Hey, *supra* note 7, at 51 and 54.

To this end, global environmental law also emphasizes the role of common but differentiated responsibility under international law.²⁰ Common but differentiated responsibility encapsulates the need for concerted action by all states to contribute to the ‘general global welfare’ based on mutual responsibility and solidarity as the basis for a sense of community and global partnership.²¹ This concept, the status of which in international law is still subject to debate,²² may justify the design of different international obligations to account for differences in the current socio-economic situations of countries, their historical contribution to a specific environmental problem, and their current capabilities to address it.²³ It may also support the role of developed countries in taking the lead in addressing global environmental issues,²⁴ thus providing a justification of unilateral or bilateral initiatives, but also entailing the respect on the part of developed countries for the allocation of less burdensome obligations on developing countries.²⁵ Furthermore, common but differentiated responsibility is usually translated into developed countries’ obligations to transfer technology and ‘new and additional’ financial means to developing countries to enable them to implement international environmental obligations.²⁶ In that respect, it serves as a ‘test for the seriousness of efforts and willingness to cooperate’ of developed countries.²⁷ Common but differentiated responsibility thus symbolizes the interrelation between the rights and obligations of states under multilateral environmental agreements and the underlying cooperation based on an equitable contribution to a common task.²⁸ The underlying solidarity can be understood because of the essential significance attached by states to certain public goods in their mutual relations, the ethical value attached to these goods by humankind, and

²⁰ *Ibid.*, at 50.

²¹ Simma, *supra* note *, at 238–239.

²² Rio Declaration, Principles 6–7. See generally L. Rajamani, *Differential Treatment in International Environmental Law* (2006). For a discussion on its status in international law compare Hey, ‘Common but Differentiated Responsibilities’, in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2012), at 444, who considers it a general principle of international law; and Stone, ‘Common but Differentiated Responsibilities in International Law’, 98 *AJIL* (2004) 276, who concludes that it is not ‘a customary principle of international law’.

²³ On the equity dimension of common but differentiated responsibility see Shelton, ‘Equity’, in D. Bondansky, J. Brunnee, and E. Hey (eds), *The Oxford Handbook of International Environmental Law* (2007), at 638, 656–658, and 661–662.

²⁴ UN Framework Convention on Climate Change, 9 May 1992, 1771 UNTS 107 (UNFCCC), Art. 3.

²⁵ There are various examples in MEAs of differentiated responsibilities: the most notable is the Kyoto Protocol to the UNFCCC (11 Dec. 1997, 2303 UNTS 148), which provides for quantified and time-bound obligations to mitigate climate change only for so-called ‘Annex-I countries’, i.e. developed countries.

²⁶ This is a common obligation across MEAs, although it is most clearly expressed in the Convention on Biological Diversity, 5 June 1992, 1760 UNTS 79 (CBD), Art. 20(4).

²⁷ Streck, ‘Ensuring New Finance and Real Emission Reduction: A Critical Review of the Additionality Concept’, 2 *Carbon and Climate L Rev* (2011) 158, at 159–160 and 168.

²⁸ Wolfrum, *supra* note 1, at 112.

the special vulnerability of the public good.²⁹ It therefore represents a ‘new form of reciprocity [that] also serves as a mechanism to provide compliance’.³⁰ Looking into common but differentiated responsibility through the lens of global environmental law permits one to highlight instances in which the functional exercise of national sovereignty is at the service not only of developing countries, but also of the well-being of individuals and groups in developing countries.

2 Global Public Goods and International Environmental Law

Global public goods are increasingly discussed as a useful framework for understanding international cooperation and the incentives that are necessary to realize global achievements that benefit humanity in the absence of a supranational authority capable of compelling states to do so.³¹ As noted above, global public goods are also part and parcel of the debate on global environmental law. This section will explain how the global public good literature can usefully inform the analysis of the interactions between international environmental law and a plurality of other legal orders (global environmental law), while also pointing to the role of international environmental law in the identification and supply of global public goods.³²

Global public goods have already been identified by international lawyers as a useful concept for understanding the interests of the international community; they refer to common values the benefits of which are ‘indivisibly spread among the entire community’ and are typically non-rival and non-excludable,³³ so that nobody has a rational economic incentive to supply them because everyone equally benefits from these goods and nobody can be excluded from their benefits.³⁴ In addition, undermining global public goods ‘necessarily affects the enjoyment of their benefits by all members of the community, that is the community as a whole, and these goods cannot be protected only for the benefit of

²⁹ Villalpando, ‘The Legal Dimension of the International Community: How Community Interests are Protected in International Law’, 21 *EJIL* (2010) 387, at 396.

³⁰ Wolfrum, *supra* note 1, at 148.

³¹ S. Barrett, *Why Cooperate? The Incentives to Supply Global Public Goods* (2007), at 19.

³² The need for economics and political science literature on international environmental cooperation to be ‘compatible with international law’ has ‘largely been ignored’ according to S. Barrett, *Environment and Statecraft* (2003), at p.xv.

³³ On the distinction between global public goods and public goods see Villalpando, *supra* note 29, at 392–394 (although the author refers to ‘public goods’ in his piece), and on exceptions to non-excludability and non-rivalry see comments by Bodansky, ‘What’s in a Concept? Global Public Goods, International Law, and Legitimacy’, this issue; Schaffer, *supra* note 3.

³⁴ Villalpando, *supra* note 29, at 392–394, in particular at n. 18.

certain members.’³⁵ This results in advanced forms of cooperation because the ‘appraisal of costs and benefits can no longer be made at the individual level, and the collective interest is to be realized even when it implies a sacrifice of the [individual] sphere of the ...members of the group’.³⁶ From this perspective, the global public goods literature could be usefully employed to complement legal debates on international law as a law of coexistence and law of cooperation,³⁷ and on the role of the international community as the ‘repository of interests that transcend those of individual states *uti singuli*’.³⁸

Global public goods, as highlighted by Daniel Bodansky and Gregory Schaffer, can be supplied in different ways.³⁹ Two types of supply appear particularly useful for the purposes of the present analysis, that is for questions of governance and legitimacy of bilateralism at the service of community interests: aggregate-efforts and single-best-effort global public goods. Aggregate efforts of the whole international communities are required to tackle global environmental challenges that not even the largest, most resourced countries can address on their own.⁴⁰ One notorious example of an aggregate-effort global public good is the fight against climate change.⁴¹ This seems to suggest that economic analysis and international environmental law⁴² coincide in identifying issues of common concern of humankind as the ‘legitimate object of international regulation and supervision’.⁴³ These issues, which are concerned with ‘protective actions’ rather than specific resources or areas, signal that ‘states’ freedom of action may be subject to limits even where other states’ sovereign rights are not affected directly in terms of transboundary harm’.⁴⁴ In other words, these are goods of universal character that require global common action, that give rise to a legitimate interest of the whole international community and to a common responsibility to assist in their protection.⁴⁵ The identification of issues of common concern by international

³⁵ *Ibid.*, at 392–393.

³⁶ *Ibid.*

³⁷ Abi-Saab, ‘Whither the International Community?’, 9 *EJIL* (1998) 248, at 251, where reference is made to law of cooperation as based on the ‘awareness among legal subjects of the existence of a common interest or common value which cannot be protected or promoted unilaterally, but only by a common effort’. The point was made by Bodansky, *supra* note 33.

³⁸ Simma and Paulus, ‘The “International Community”: Facing the Challenge of Globalization’, 9 *EJIL* (1998) 266.

³⁹ *Supra* notes 34 and 4 respectively.

⁴⁰ Barrett, *supra* note 31, at 101.

⁴¹ *Ibid.*, at 84–100.

⁴² UNFCCC, preamble; CBD, preamble. On the need for international consensus on the identification of common concern see Brunnee, ‘Common Areas, Common Heritage and Common Concern’, in Bodansky, Brunnee, and Hey, *supra* note 23, at 550, 565.

⁴³ P. Birnie, A. Boyle, and C. Redgwell, *International Law and the Environment* (2009), at 128 and 131.

⁴⁴ Brunnee, *supra* note 42, at 565–566.

⁴⁵ Birnie, Boyle, and Redgwell, *supra* note 43, at 128.

law results in limiting national sovereignty of individual states and holding them accountable for compliance with their international obligations through international institutions with supervisory powers.⁴⁶

The merit of using the global public good literature lies in the identification of risks of free-riding in the international regulation of issues of common concern: even if a group of countries supplies this type of good, others will not have an incentive to step up their efforts to do so. Thus, an economic perspective underlines that international treaties need to create not only controls but also incentives to make participation attractive and compliance likely.⁴⁷ The analysis of issues of common concern in the global public good literature highlights that the supply of these goods relies on the leadership of certain countries, whose successful efforts then also benefit other countries with fewer resources.⁴⁸ This clearly reflects one dimension of common but differentiated responsibility that is coupled with the identification of common concern in international environmental treaties.⁴⁹ It further reflects the need for financial and technical solidarity towards developing countries with a view to benefitting humanity as a whole. Common but differentiated responsibility can thus be seen as the by-product of aggregate-efforts global public goods and a potential justification for single-best-effort global public goods.

Single-best-effort global public goods, however, are goods that can be supplied ‘minilaterally’, that is by one or a restricted group of countries to the benefit of all other countries. They become particularly relevant in situations in which multilateralism fails to provide or delays urgent responses.⁵⁰ Single best efforts can possibly also catalyze the creation of a coordinated response by other countries⁵¹ (leading by example), thereby contributing to international cooperation⁵² and possibly promoting multilateral standard-setting.⁵³ Their role can be essential when multilateralism is seen as an expression of what is ‘politically feasible’ rather than necessarily a guarantee of advancing the international community’s interests and the needs of human beings as a whole.⁵⁴ Thus, international legal scholars have already debated the possible benefits of unilateralism as the extra-territorial

⁴⁶ *Ibid.*, at 130 and 132.

⁴⁷ Barrett, *supra* note 31, at 101.

⁴⁸ *Ibid.*, at 189.

⁴⁹ Characterized as a ‘common sharing of burdens of cooperation and problem solving’ by Brunnee, *supra* note 42, at 566.

⁵⁰ *Ibid.*, at 41.

⁵¹ *Ibid.*, at ch. 1.

⁵² Boisson de Chazournes, ‘Unilateralism and Environmental Protection: Issues of Perception and Reality of Issues’, 11 *EJIL* (2000) 315, at 318.

⁵³ Bodansky, ‘What’s so Bad about Unilateral Action to Protect the Environment?’, 11 *EJIL* (2000) 339, at 344.

⁵⁴ Alvarez, ‘Multilateralism and its Discontents’, 11 *EJIL* (2000) 393, at 398.

legislative or enforcement action in the face of the ‘obstinate refusal’ to negotiate, join, or enforce international treaties.⁵⁵

One can thus distinguish initiatives *within* a multilateral framework geared to supplying aggregate-efforts global public goods from other initiatives *beyond* such a framework that are geared to supplying a single-best effort global public good.⁵⁶ The latter, however, while being undertaken outside a multilateral framework, may still contribute to reaching its objectives: that would be the case of bilateral initiatives aimed to support the implementation of multilateral environmental agreements. The global public good literature can thus serve to challenge the traditional understanding of bilateralism as the relationships whereby each state protects its own rights and third states have no possibility to object to such a course of action, and as a ‘severe obstacle standing in the way of stronger solidarity in international relations’.⁵⁷

Looking at bilateral initiatives from the perspective of the global public goods literature allows one better to understand governance problems associated with single-best-effort global public goods. These mini-lateral initiatives may carry risks or cause other harm (including a more serious risk or harm than the benefit that will be received through the supply of the single-best-effort global public good) to certain countries, and ultimately the decisions and balancing of benefits and risks are in the hands of the country or group of countries that have the power and incentive to supply these goods.⁵⁸ In the words of Scott Barrett, ‘those countries unilaterally providing single-best-effort global public goods cannot be counted upon to take into account the interests of other countries’.⁵⁹ From the viewpoint of international law, critical questions as to the identification of extraterritorial effects⁶⁰ of such mini-lateral initiatives thus remain controversial. In addition, a legitimacy question also surrounds the determination that multilateralism is at a certain point in time ineffective or incapable of delivering certain global public goods, which underpins unilateral or mini-

⁵⁵ See generally 11 *EJIL* (2000) (issues 1–2) special issue and in particular Jansen, ‘The Limits of Unilateralism from a European Perspective’, 11 *EJIL* (2000) 309, at 310–312.

⁵⁶ I am grateful to Gracia Marín Durán for suggesting this terminology.

⁵⁷ Simma, *supra* note *, at 229–231 and 233.

⁵⁸ Barrett, *supra* note 31, at 23. For a discussion from a legal viewpoint see Bodansky, *supra* note 53, at 339–341.

⁵⁹ Barrett, *supra* note 31, at 45.

⁶⁰ See the distinction drawn by Kokott AG between extraterritorial effects and extraterritorial implications with regard to EU internal measures that do not embody a concrete rule of conduct for subjects beyond the territory of the EU, but still create an indirect incentive for them: Opinion, Case C–366/10 *Air Transport Association of America and Others*, 6 Oct. 2011, available at: <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-366/10#>, at paras 145–147.

lateral actions.⁶¹ The actual urgency, or in all events appropriate timing at which it becomes unreasonable to wait any longer for the development of a multilateral solution, and therefore acceptable to proceed unilaterally or mini-laterally remains a matter of contention.⁶² Pierre-Marie Dupuy, for instance, suggests that the multilateral route should be deviated from only when states have exercised without success the ‘diligence that might be reasonably expected of them’ to reach a mutually accepted solution.⁶³

These legitimacy concerns are particularly important in situations in which single-best-effort global public goods may affect the incentives to supply related goods⁶⁴ (notably, aggregate-efforts goods) – so, when unilateral or mini-lateral initiatives may undermine or circumvent the international law deriving from multilateral frameworks, by ‘effectively preempting official decisions to be taken by a legally designated [international] entity’⁶⁵ – or may result in the imposition of one country’s own interpretation of international law on others.⁶⁶ Once again, these risks are well-known to international lawyers (and remain topical) *vis-à-vis* unilateralism and its potential to ‘avoid, mitigate or reinterpret legally required outcomes’,⁶⁷ or to ‘coerce states’ to adopt an approach ‘favoured’ by the state(s) supplying single-best-effort goods.⁶⁸ A practical example that has recently been discussed in legal literature is the EU’s unilateral initiative to include the aviation sector in its emission trading scheme as a way of imposing the EU’s interpretation of the international climate regime while taking the lead at a time at which the multilateral system was unable to make progress on the issue.⁶⁹

Possible solutions to these governance problems can, according to a somewhat circular logic, still be found in international (environmental) law, which can provide mechanisms for the coordination of different countries’ unilateral or mini-lateral initiatives, put pressure on these countries supplying single-best-effort goods to exercise restraint, allow other countries to have a say in mini-lateral initiatives that may negatively impact

⁶¹ Reisman, ‘Unilateral Action and the Transformation of the World Constitute Process: The Special Problem of Humanitarian Intervention’, 11 *EJIL* (2000) 3, at 6.

⁶² These are the words of Kokott AG, *supra* note 60, at paras 185–186. The problem of the timing of unilateral measures is also discussed by Jansen, *supra* note 55, at 313; and Boisson de Chazournes, *supra* note 52, at 332; Bodansky *supra* note 53, at 347.

⁶³ Dupuy, ‘The Place and Role of Unilateralism in Contemporary International Law’, 11 *EJIL* (2000) 19, at 24.

⁶⁴ Barrett *supra* note 31, at 23.

⁶⁵ Reisman, *supra* note 61, at 3–4.

⁶⁶ Barrett, *supra* note 31, at 23.

⁶⁷ Boisson de Chazournes, *supra* note 52, at 317.

⁶⁸ Bodansky, *supra* note 53, at 347.

⁶⁹ Compare Scott and Rajamani, ‘EU Climate Change Unilateralism: International Aviation in the European Emissions Trading Scheme’, 23 *EJIL* (2012) 000 and Kulovesi, ‘“Make Your Own Special Song, Even if Nobody Else Sings Along”: International Aviation Emissions and the EU Emissions Trading Scheme’, 2 *Climate L* (2011) 535.

upon them, or facilitate their participation in these efforts, which eventually confers legitimacy on them.⁷⁰

The synergies between mini-lateral and multilateral action point to an interaction of aggregate-efforts and single-best-effort global public goods that is the central theme of this article, which will be explored in relation to the effective implementation of multilateral environmental agreements through bilateral initiatives. The implementation and enforcement of multilateral environmental agreements are a collective problem that would appear to be an aggregate-efforts global public good.⁷¹ Enforcement of international law, however, remains the ‘multilateralists’ Achilles heel’⁷² and recent practice shows that treaty implementation and enforcement are increasingly delivered as single-best-effort global public goods for which a limited number of states provide new incentives (additional to those offered by international institutions) to other countries lagging behind in implementation. Another dimension, that is only touched upon in this article but represents an essential element for evaluating the legitimacy of bilateralism, is the respect for financial solidarity obligations under multilateral environmental treaties when operating beyond multilateral framework. Financial solidarity obligations are a further reflection of common but differentiated responsibility⁷³ and in principle an aggregate-efforts global public good: it is the total effort of financial contributions by rich countries that determines the reaching of certain international objectives⁷⁴ to the benefit of the whole international community.⁷⁵ In practice, however, the qualified and open-ended formulation of these international obligations in multilateral environmental agreements can lead to their delivery as single-best-effort global public good: they are often seen as voluntary commitments, provided unilaterally, and compliance is not systematically monitored at the multilateral level.⁷⁶

⁷⁰ Barret identifies these options, (*supra* note 31, at 32, 37, 111), but without discussing the role of international law in providing such responses. The need for those affected by unilateral decisions to participate in the decision-making process as a condition for the legitimacy of unilateral action is also highlighted by Bodansky, *supra* note 53, at 341.

⁷¹ Barrett, *supra* note 31, at 82.

⁷² Alvarez, *supra* note 54, at 402.

⁷³ Montreal Protocol on Substances that Deplete the Ozone Layer, 16 Sept. 1987, 1522 UNTS 3 (Montreal Protocol), Art. 5.7; CBD Art. 20.4; UNFCCC, Art. 4.7; Stockholm Convention on Persistent Organic Pollutants, 22 May 2001, 2256 UNTS 119 (Stockholm Convention), Art. 13.4 (see comments on the legal implications of these provisions by Boisson de Chazournes, ‘Technical and Financial Assistance’, in Bodansky, Brunnee, and Hey, *supra* note 23, at 947, 970).

⁷⁴ Barrett, *supra* note 31, at 8 and 81.

⁷⁵ This is more clearly reflected in second-generation financial mechanisms under multilateral environmental agreements that seek to address issues of common concern with a view to achieving global benefits through cooperative action: Boisson de Chazournes, *supra* note 73, at 963–966.

⁷⁶ Romanin Jacur, ‘Controlling and Assisting Compliance: Financial Aspects’, in Treves *et al.*, *supra* note 1, at 419, 435.

The global public goods literature may thus help to highlight the governance risks inherent in employing bilateralism with a view to contributing to effective and fair partnership in implementing international environmental law beyond multilateral frameworks.⁷⁷ This literature can therefore dispel concerns about the ‘moral deficiencies of bilateralism’ as an approach to international cooperation that does not contribute to a ‘socially conscious legal order’, to international solidarity, and to the common interests of the international community comprising ‘in the last instance human beings’.⁷⁸ The interaction between single-best-effort and aggregate-effort global public goods may thus show that bilateralism, as opposed to being superseded or even abolished by community elements of international law,⁷⁹ has been returned to in order explicitly and systematically to put it to the service of the realization of community interests. In that regard, the ‘moral basis’ that can persuasively justify certain states’ claims to contribute on their own to the pursuit of community interests necessarily lies in a mutual relationship with multilateralism.

3 Non-judicial Enforcement of Global Environmental Law

The compliance mechanisms established under multilateral environmental agreements provide ideal ‘laboratories’ for the analysis of the interactions between different legal orders at the international, national, and local levels. Compliance mechanisms can be seen as the regime-specific collective form of non-judicial enforcement that is a logical consequence of the focus of international environmental law on issues of common concern and its functionalization of the role of states.⁸⁰ These mechanisms address issues of non-compliance as a threat to the existence of a community established with the intention of collectively achieving the objective of the multilateral environmental agreement.⁸¹ They allow not only the states concerned in the compliance procedure to be involved in the discussions on alleged non-compliance, but also all other parties to the agreement to participate with a view to finding a collective solution.⁸² Compliance mechanisms are also increasingly participating in the dynamic interaction between different legal orders: they may creatively cooperate with national courts and international tribunals, interact in official and unofficial ways with NGOs,

⁷⁷ Shelton, *supra* note 23, at 661–662; Boisson de Chazournes, *supra* note 73, at 947, 948–949, and 957–958.

⁷⁸ Simma *supra* note *, at 234.

⁷⁹ *Ibid.*, at 235.

⁸⁰ Cardesa-Salzmänn, ‘Constitutionalizing Secondary Rules in Global Environmental Regimes: Non-Compliance Procedures and the Enforcement of Multilateral Environmental Agreements’, 24 *J Environmental L* (2012) 103.

⁸¹ Wolfrum, *supra* note 1, at 99.

⁸² *Ibid.*, at 149.

and even have an impact on private actors.⁸³ They can thus be seen as a component of global environmental law.

As will be discussed below, recent bilateral initiatives refer to, or incorporate the findings of, compliance mechanisms with a view to contributing to the effective implementation of multilateral environmental agreements beyond the multilateral setting (in an effort to supply single-best-effort global public goods). Interestingly, these bilateral initiatives are not meant to provide an *alternative* to multilateral non-judicial enforcement, but rather a *complement* to it. Reliance on compliance mechanisms is a key to exploring the dynamic relationship between multilateralism and bilateralism with a view to assessing whether states supplying single-best-effort global public goods engage in a 'self-serving' exercise or rather provide dynamic and responsive solutions to impasses at the multilateral level or implementation gaps.⁸⁴ In that regard, reliance on compliance mechanisms can be considered a ground for assessing the legitimacy of single-best-effort global public goods. In particular, the compliance mechanisms developed under the composite international biodiversity regime have been selected as a case study. From a global public good perspective, the international biodiversity regime aims to supply the aggregate-efforts global public good of biodiversity conservation, as an issue of common concern, and has set in place innovative ways to ensure international cooperation as well as national and local partnerships between state and non-state actors.⁸⁵ Within the international biodiversity regime two scenarios have been selected: an existing one and a future one. The existing scenario concerns the compliance systems under CITES and its links with US and EU bilateral trade measures. The second scenario concerns the future compliance mechanism under the Nagoya Protocol on Access and Benefit-Sharing, and its reliance on an increasing plurality of legal orders, with a view to identifying opportunities and challenges for single-best-effort global public goods in that context.

A A Shift towards Bilateralism to Support CITES Implementation

⁸³ Cardesa-Salzmänn, *supra* note 80.

⁸⁴ Shaffer and Bodansky, 'Transnationalism, Unilateralism and International Law', 1 *Transnat'l Environmental L* (2012) 31.

⁸⁵ For instance, the legal concept of benefit-sharing has evolved under the CBD as a tool for inter-state cooperation as well as for partnership between states, local communities, and the private sector: Morgera and Tsoumani, 'The Evolution of Benefit-sharing: Linking Biodiversity and Community Livelihoods', 15 *RECIEL* (2010) 150.

As opposed to other multilateral environmental treaties, CITES has developed over time a complex compliance system which, among a plurality of compliance procedures,⁸⁶ includes an international machinery for the monitoring of national legislation subject to trade sanctions. CITES' National Legislation Project has since 1992 enabled the CITES Secretariat, in the absence of an explicit basis in the Convention in this regard, to determine whether parties' national legislation adequately implements the Convention, by categorizing each country's legislation as meeting all, some, or none of the requirements for implementing CITES. The categorization is based on a clear articulation of the minimum requirements set by CITES in terms of implementing the convention in national law: designation of competent authorities, prohibition of trade in specimens in violation of the convention; penalization of such trade, and the confiscation of specimens illegally traded or possessed. Countries in the lower category have to develop a 'CITES Legislation Plan' establishing agreed steps and a timeframe for the adoption of national legislation; failing to submit the Plan or to adopt adequate legislation by set deadlines may result in the recommended suspension of commercial trade in all CITES species with the party, although the Secretariat may withhold action if good legislative progress has been made by a party.⁸⁷

The Project has, on the one hand, increased the CITES Secretariat's work in assisting countries in developing or revising their implementing legislation. Upon request, the Secretariat reviews and comments on draft legislation. It has also developed a legislative guidance package (containing a model law, legislative checklist, and format for legislative analysis). In addition, it convenes regional and national workshops on drafting CITES-implementing legislation, fields experts to assist countries in developing legislation, and has set up various bilateral and multilateral legislative projects.⁸⁸ As the extent of CITES support has been limited by its 'shrinking budget and limited funds from external sources',⁸⁹ the

⁸⁶ Reeve, 'Wildlife Trade, Sanctions and Compliance: Lessons from the CITES Regime', 82 *Int'l Affairs* (2006) 881, who identifies 6 compliance mechanisms under the treaty (at 886–888). See also Biniaz, 'Remarks about the CITES Compliance Regime', in Beyerlin, Stoll, and Wolfrum, *supra* note 1, at 89.

⁸⁷ CITES Resolution Conf. 8.4 which instructs the Standing Committee to determine which Parties have not adopted appropriate measures for effective implementation of the Convention and to consider appropriate compliance measures, which may include recommendations to suspend trade, in accordance with Resolution Conf. 14.3; directs the Secretariat to seek external funding to enable it to provide technical assistance to Parties in the development of their measures to implement the Convention; and invites all Parties, governmental, intergovernmental, and non-governmental organizations, and other sources to provide financial and/or technical assistance for the development and effective implementation of such measures; and Art. XII CITES. The author is grateful to Soledad Aguilar for her contributions on CITES in Morgera *et al.*, 'Implementation Challenges and Compliance in MEA Negotiations', in P. Chasek and L. Wagner (eds), *The Roads from Rio: Lessons Learned from Twenty Years of Multilateral Environmental Negotiations* (2012), at 222.

⁸⁸ See www.unep.org/dec/onlineManual/Enforcement/NationalLawsRegulations/Resource/tabid/780/Default.aspx.

⁸⁹ Reeve, *supra* note 86, at 885.

gradual expansion of the Secretariat's mandate and notably the introduction of field work have led to increasing interactions with non-state actors.⁹⁰ NGOs in particular have played a significant role in the compliance mechanisms under CITES, in both formal and informal ways, either by volunteering information on country compliance or running capacity-building and training activities to support national enforcement efforts.⁹¹ Furthermore, CITES' Legislation Project has enabled CITES to exercise international surveillance and monitoring of national implementation, which rests on the possibility for the CITES Standing Committee to recommend that poor performance under the Legislation Project, where all possible efforts do not achieve the desired result, is sanctioned with trade suspensions. As a result, national legislative sovereignty is closely monitored and significantly influenced by CITES bodies, on the basis of a comparative analysis of existing national laws and international guidelines, and a network of experts participating in relevant multilateral deliberations and field activities.

CITES implementation has long been seen as a global public good that could also be supplied through single best efforts. In the past unilateral initiatives had been put in place by both the US and EU to support CITES implementation, through the enactment of internal legislation providing for the imposition of unilateral trade sanctions on third countries.⁹² Recently, however, there seems to have been a shift towards bilateral initiatives supporting CITES implementation in third countries. The 2007 US–Peru Free Trade Agreement (FTA) includes both certain cooperation clauses to address the capacity-building needs of Peru in developing, implementing, and enforcing environmental and forest law and protecting wildlife and endangered species,⁹³ as well as an obligation for parties to adopt, maintain, and implement laws, regulations, and all other measures to fulfill obligations under the multilateral environmental agreements listed in an Annex including CITES.⁹⁴ In addition, an Annex to the FTA incorporates Peru's obligations arising from CITES' compliance system into the bilateral agreement.⁹⁵ It should be further noted that under the FTA US officials are expected to participate in verifications of compliance with Peruvian laws by producers and

⁹⁰ This can be seen as a reflection of a general trend in international organizations: see generally Boisson de Chazournes, 'Changing Roles of International Organizations: Global Administrative Law and the Interplay of Legitimacies', 6 *Int'l Orgs L Rev* (2009) 655.

⁹¹ Reeve, *supra* note 86, at 885.

⁹² Sand, 'Whither CITES? The Evolution of a Treaty Regime in the Borderland of Trade and Environment', 1 *EJIL* (1997) 29, at 39–40.

⁹³ US–Peru Trade Promotion Agreement: Benefiting the Environment through Improved Forest Sector Governance (July 2007), Annex 18.3.4, Art. 4, available at: <http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text>.

⁹⁴ *Ibid.*, Art. 18.2 and Annex 18.2.

⁹⁵ *Ibid.*, Annex 18.3.4 on Forest Sector Governance.

exporters of timber products.⁹⁶

Although it is not possible to engage in a fully fledged comparison between the EU and US practice on integrating CITES implementation issues into bilateral instruments,⁹⁷ it is useful to point to the fact that the EU has attempted to ‘improve’ on US practice in that regard.⁹⁸ The most recent bilateral trade agreements of the EU present a different link with multilateral environmental agreements’ compliance mechanisms. They establish a trade-related obligation effectively to implement key multilateral environmental agreements (including CITES).⁹⁹ In order to promote the sustainable management of forest resources, parties commit to work together to improve forest law enforcement and governance and to promote trade in legal and sustainable forest products through instruments that may include the effective use of CITES with regard to endangered timber species.¹⁰⁰ Like those of the US, the EU bilateral agreements also include provisions on technical assistance and capacity building in the implementation and enforcement of multilateral environmental agreements.¹⁰¹ In addition, the EU bilateral agreements explicitly prohibit a party from undertaking law enforcement activities in the territory of another Party with regards to environmental matters.¹⁰²

Both the US and the EU bilateral agreements include noteworthy institutional provisions. A bilateral institution is put in place under the US–Peru FTA to consider and discuss the implementation of the environmental cooperation agreement and submit any comments and recommendations, including those received from the public, to the parties.

⁹⁶ Jinnah, ‘Strategic Linkages: The Evolving Role of Trade Agreements in Global Environmental Governance’, 20 *J Environment & Development* (2011) 191, at 199.

⁹⁷ Partly because insufficient practice is yet available on EU recent initiatives discussed below.

⁹⁸ Zvelc, ‘Environmental Integration in the EU Trade Policy: the Examples of the GSP+, trade Sustainability Impact Assessments and Free Trade Agreements’, in E. Morgera (ed.), *The External Environmental Policy of the European Union: EU and International Law Perspectives* (forthcoming 2012).

⁹⁹ And also: CBD and the Cartagena Protocol on Biosafety, 29 Jan. 2000, 2226 UNTS 208 (Biosafety Protocol), the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 22 Mar. 1989, 1673 UNTS 57 (Basel Convention), the Stockholm Convention, and the Rotterdam Convention on the Prior Informed Consent for Certain Hazardous Chemicals and Pesticides, 10 Sept. 1998, 2244 UNTS 337 (Rotterdam Convention), the UNFCCC, and the Kyoto Protocol. Free Trade Agreement between the EU and its Member States, on one side, and Colombia and Peru, on the other, 23 and 24 Mar. 2011, available at: www.trade.ec.europa.eu/doclib/press/index.cfm?id=691 (hereinafter the EU–COPE FTA), Art. 270(2) and Agreement establishing an Association between the EU and its Member States, on the one hand, and Central America on the other, 22 Mar. 2011, available at: www.trade.ec.europa.eu/doclib/press/index.cfm?id=689 (hereinafter, the EU–Central America AA), Art. 287(2).

¹⁰⁰ *Ibid.*, Art. 289; EU–COPE FTA, *supra* note 99, Art.273(a). This is complemented by an additional specialized bilateral approach under the EU FLEGT initiative: Commission, ‘Forest Law Enforcement, Governance and Trade (FLEGT): Proposal for an Action Plan’, COM(2003)251 final, at 3; endorsed by the Council, ‘Conclusions – Forest Law Enforcement, Governance and Trade (FLEGT)’, OJ (2003) C268/1; Reg. 2173/2005, OJ (2005) L347/1.

¹⁰¹ E.g., EU–Central America AA, *supra* note 99, Art. 63 and EU–COPE FTA, *supra* note 99, Art. 286.

¹⁰² *Ibid.*, Art. 277(4).

Implementation of the FTA has focused in particular on compliance with the forest-related Annex providing that Peru comply with specific recommendations arising from the CITES compliance mechanisms by, *inter alia*, cooperating in a manner that took into account decisions and resolutions of the CITES Conference of the Parties as well as its Standing Committee, Animals Committee, and Plants Committee. Ultimately, however, compliance with the forest-related Annex is subject to the FTA's dispute settlement provisions, with the possibility of imposing sanctions,¹⁰³ although parties are to defer to CITES' interpretation of the status of implementation of a party to that end.¹⁰⁴ In an effort to distance itself from the sanction-based approach of the US–Peru FTA, the EU bilateral agreements aim to embody 'a co-operative approach based on common values and interests, taking into account the differences in [parties'] levels of development and the respect of their current and future needs and aspirations'.¹⁰⁵ To this end, a specialized bilateral committee is set up to oversee the implementation of the 'trade and sustainable development' obligations included in the agreement, as well as special procedures for settling trade and environment disputes, requiring the involvement of environmental experts, and allowing also for advice to be sought from the Secretariats of multilateral environmental agreements. While there is no attempt directly to incorporate guidance from relevant compliance mechanisms of the listed multilateral environmental agreements, the EU bilateral agreement provides several entry points for interaction with multilateral environmental agreements' Secretariats and their compliance mechanisms. For instance, in cases of disagreement or 'regarding any matter of mutual interest', each party may request consultations¹⁰⁶ which, subject to the agreement of both parties, can include the soliciting of information from environmental organizations and bodies.¹⁰⁷ Furthermore, a party may, after certain period of time, ask that a panel/group of experts in the field of trade and sustainable development be convened which should also seek advice from competent international organizations.¹⁰⁸ Notably, the Panel's recommendations shall take into account the particular socio-economic situation of the parties,¹⁰⁹ and parties are to endeavour to discuss appropriate measures, such as possible cooperation to support the implementation of recommended measures.¹¹⁰ It can be expected that the practice developed

¹⁰³ US–Peru FTA, *supra* note 93, ch. 21.

¹⁰⁴ *Ibid.*, ch. 18, Art. 8(b).

¹⁰⁵ EU–Central America AA, *supra* note 99, Art. 274.

¹⁰⁶ *Ibid.*, Art. 296, EU–COPE FTA, *supra* note 99, Art. 283.

¹⁰⁷ EU–Central America AA, *supra* note 99, Art. 296(2).

¹⁰⁸ *Ibid.*, Arts. 297–301, EU–COPE FTA, *supra* note 99, Arts 284–285.

¹⁰⁹ EU–Central America AA, *supra* note 99, Art. 300(3).

¹¹⁰ *Ibid.*, Art. 301(3).

under the unilateral Generalized System of Preferences of the EU¹¹¹ in relation to the effective implementation of key multilateral environmental agreements will inform future practice under the FTAs, particularly given that FTAs are expected to be concluded with the EU GSP+ beneficiaries, and therefore gradually replace the unilateral instrument with a bilateral one.¹¹² Accordingly, the EU will mostly focus on the existence of implementing legislation in partner countries and relevant assessments made by the compliance mechanisms.¹¹³

This *nouvelle vague* of bilateral agreements also seeks to allow for public participation. The US–Peru FTA tasks the bilateral environmental affairs council with receiving public views and comments;¹¹⁴ as well as considering inputs received from each party’s consultative or advisory committee established to exchange information relating to the implementation of the FTA environmental provisions with the public.¹¹⁵ In addition, any member of the public of one party may send submissions asserting that a Party is failing to enforce its environmental laws effectively,¹¹⁶ which may lead the council to issue recommendations relating to the further development of the party’s mechanisms for monitoring its environmental enforcement.¹¹⁷ The EU agreements require the establishment of national advisory groups of stakeholders and of a joint civil society forum that can submit findings and opinions to the parties on the sustainable development aspects of the bilateral agreement’s implementation.¹¹⁸

These bilateral initiatives to support the work of compliance mechanism, either by providing additional sanctions (that is, providing ‘bigger’ sticks to CITES), as in the US case,¹¹⁹ or incentives to support the implementation of the agreement more generally (that is, complementing CITES sticks with ‘carrots’), as in the case of the EU. To that extent, the EU and US are contributing to the effective implementation of CITES as a single-best-effort global public good through bilateral trade measures. In doing so, they provide on a bilateral basis layers of monitoring that are additional to those at the multinational level over the state

¹¹¹ Council Reg. (EC) 732/2008 applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011, OJ (2008) L211/1.

¹¹² Zvelc, *supra* note 98.

¹¹³ *Ibid.*

¹¹⁴ US–Peru FTA, *supra* note 93, Art. 18.6(2).

¹¹⁵ *Ibid.*, Art. 18.7(6).

¹¹⁶ *Ibid.*, Art. 18.8.

¹¹⁷ *Ibid.*, Art. 18.9(8).

¹¹⁸ G. Marín Durán and E. Morgera, *Environmental Integration in the EU’s External Relations: Beyond Multilateral Dimensions* (2012), at ch. 2: EU–Central America AA, *supra* note 99, Art. 294(4)(5) and EU–COPE FTA, *supra* note 99, Arts 281–282.

¹¹⁹ Jinnah, *supra* note 96, at 194.

that is found to be in non-compliance. Both innovative models of bilateralism incorporate key features of the protection of community interests as identified by Bruno Simma in opposition to traditional forms of bilateralism, namely: reliance on or reference to international organizations, notably the multilateral environmental agreements compliance mechanisms; a broad understanding of the connections between the various interests of the international community; and North–South solidarity.¹²⁰

The legitimacy of these initiatives essentially rests on their explicit reliance on the assessment of multilateral compliance bodies¹²¹ in the case of the US, and possibly in directly liaising with them in the context of bilateral trade relations with other countries, in the case of the EU. In addition, it is very significant that bilateralism seems increasingly to adopt a trait of the law of cooperation, that of conceiving the application of sanctions only in an ‘institutionalized context of cooperation’.¹²² This new form of bilateralism, however, may also create legitimacy risks: potentially bilateral trade avenues could subvert the internationally determined implications of common but differentiated responsibility under multilateral environmental agreements and specific globally determined allocation of international responsibility under multilateral environmental agreements’ governance bodies. In particular, it remains to be assessed whether appropriate consideration can be given to the special circumstances of developing countries outside multilateral system. Equally importantly, the link between these bilateral initiatives and the multilateral obligations of financial solidarity that are part and parcel of the compliance system under MEAs remain significantly unclear. For instance, it has been highlighted that ‘the EU has generally resisted undertaking bold commitments on financial and technical assistance as part of the [bilateral] negotiations’ and as a result the relevant provisions are framed in ‘very general terms’;¹²³ and the amount of external funding that the EU makes available for environmental purposes is modest.¹²⁴

A global environmental law perspective, however, would push the analysis beyond this point by looking into interactions between multilateral and bilateral international law and national law, as well as the role of state and non-state actors in that connection. In that regard, it has been argued that the US–Peru FTA, for instance, resulted in ‘transferring regulatory

¹²⁰ Simma, *supra* note *, at 236–237.

¹²¹ Zvele, *supra* note 98.

¹²² Abi-Saab, *supra* note 37, at 253.

¹²³ Marín Durán and Morgera, *supra* note 118, at 103.

¹²⁴ European Commission, ‘Working Paper on Improving Environmental Integration in Development Cooperation’, SEC(2009)555 final, at 4.

authority from [CITES] to the bilateral framework created by the free trade agreement':¹²⁵ the FTA Annex reflected CITES' recommendations regarding the implementation of mahogany trade controls, which had been resisted by Peru in the framework of CITES processes, but also went beyond CITES requirements – 'in effect expanding the scope of CITES beyond that which is politically possible under the agreement itself'.¹²⁶ On the one hand, empirical research shows the direct link between the US bilateral initiative and the compliance mechanisms, and therefore the positive interaction between single-best-effort and aggregate-efforts global public goods. The FTA 'subtly but quickly catalysed Peru's lagging implementation' of CITES leading to national 'legislative reform... addressing what was previously intractable CITES implementation issues'.¹²⁷ On the other hand, the same study also pointed to the 'catastrophic social unrest' which had been caused by the rushed and non-transparent legislative activity that had significant consequences on indigenous groups' land rights in Peru.¹²⁸ Notably, national legislative activity had been facilitated both under the FTA and in parallel under CITES: both parties to the FTA requested the CITES Secretariat to conduct a legislative assistance mission to Peru, and as a result Peru was promoted to Category 1 under CITES Legislation Project.¹²⁹

B Future Compliance with the Nagoya Protocol: Bilateralism and Increasing Plurality of Legal Orders

The Nagoya Protocol on Access and Benefit-Sharing is an innovative and cryptic new multilateral environmental agreement that has significantly developed the international biodiversity regime. It creates new international obligations between countries that provide access to and countries that use genetic resources and traditional knowledge, as well as spelling out the rights of indigenous and local communities to their traditional knowledge and to genetic resources held by them.¹³⁰ In both respects, the Protocol significantly contributes to making states' role functional to the protection of the interests of their own communities, as well as of the communities in other states. The implementation of the Protocol will entail complex and creative links between different areas of international law,¹³¹ a dynamic web of

¹²⁵ Jinnah, *supra* note 96, at 197–198 and 209.

¹²⁶ *Ibid.*, at 202.

¹²⁷ *Ibid.*, at 203.

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*, at 206–207.

¹³⁰ E. Morgera is preparing with M. Buck and E. Tsioumani a commentary to the Nagoya Protocol to be published by Martinus Nijhoff in 2013.

¹³¹ E. Morgera, M. Buck, and E. Tsioumani (eds.), *The Nagoya Protocol in Perspective: Implications for International Law and Implementation Challenges* (forthcoming 2012).

national laws of provider and user countries and contractual arrangements between private parties feeding into a system of internationally recognized certificates,¹³² and the respect for the customary laws of local and indigenous communities at all these regulatory levels.¹³³ The effective implementation of the Nagoya Protocol will thus essentially rely on a plurality of legal orders. Its open-ended provisions, particularly those concerning indigenous peoples and local communities' customary laws and procedures, will probably allow for a variety of legal approaches to implementation, through creative relations between local, national, and international law.

The Protocol includes an enabling clause on monitoring compliance at the international level, foreseeing the future establishment of a compliance mechanism of a cooperative and non-adversarial nature.¹³⁴ It remains to be seen how compliance with the unprecedented obligations of the Protocol will be monitored, particularly compliance with obligations *vis-à-vis* indigenous and local communities or state compliance with obligations to ensure that users respect other countries' national legislation. The novelty of the compliance challenges raised by the Protocol was perceived by its negotiators, who considered a potentially ground-breaking option in international environmental law – the establishment of an international ombudsperson to support parties and indigenous and local communities in identifying breaches and to provide technical and legal support in ensuring the effective redress of such breaches.¹³⁵ If such a feature had been included in the Protocol, it could have resulted in a compliance mechanism being able to work in different legal orders: at the national and local level through field missions, while providing immediate access to the international level to these communities.¹³⁶ While this idea was eventually not incorporated into the final text of the Protocol, there is nothing to prevent parties from establishing such a body in the future through a decision of the Conference of the Parties.

¹³² Nagoya Protocol, Art. 17(2)–(4).

¹³³ *Ibid.*, Art. 12(1).

¹³⁴ Nagoya Protocol, Art. 30.

¹³⁵ See Art. 14 bis in Draft Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilization to the Convention on Biological Diversity, UN Doc. UNEP/CBD/COP/10/5/Add.5, Annex I (2010).

¹³⁶ A comparable institution can be found in the context of the World Bank family: the Compliance Advisor/Ombudsman (CAO) of the International Finance Corporation. See the CAO website at : www.cao-ombudsman.org/. For a discussion see Morgera, 'Human Rights Dimensions of Corporate Environmental Accountability', in P.M. Dupuy, F. Francioni, and U. Petersmann (eds), *Human Rights, Investment Law and Investor–State Arbitration* (2009), at 511.

Otherwise, parties could agree on a stakeholder trigger, similar to that of the Aarhus Convention.¹³⁷

At all events, a compliance mechanism under the Nagoya Protocol will certainly engage with a plurality of legal orders. Even in pure inter-state situations falling under the Nagoya Protocol, cooperation between user and provider countries will occur at the level both of legislative action¹³⁸ and of enforcement.¹³⁹ A future compliance mechanism will probably have to assess the compatibility of national measures of different countries with one another, the appropriateness of user countries' national measures to ensure compliance by private entities or individuals as users of genetic resources or traditional knowledge with the provider country's legislation, and inter-state collaborative enforcement actions.¹⁴⁰ In addition, the future compliance mechanism will have to assess respect for communities' customary laws, as well as for applicable community rules and procedures at different levels of implementation.¹⁴¹

To some extent this task may be facilitated by the use of 'community protocols' – tools attempting to bridge inter-state benefit-sharing with communities' needs, aspirations, and livelihoods.¹⁴² Supporting a bottom-up approach, these protocols are written documents developed by a community, following a consultative process, to outline the core ecological, cultural, and spiritual values and customary laws relating to the community's traditional knowledge and resources, based on which the community provides clear terms and conditions to regulate access to its knowledge and resources.¹⁴³ The protocols therefore can be seen as an expression of global environmental law, in linking local and the international legal levels, according to standards and procedures set out in customary, national, and international law, with a view to mobilizing communities to use international and national law to support the local manifestation of the right to self-determination.¹⁴⁴ Community protocols are also the

¹³⁷ As proposed by Switzerland: T. Kantai, E. Morgera, and D. Paul, *Summary of the First Meeting of the Intergovernmental Committee for the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity: 5–10 June 2011* (2011), at 9:551 *Earth Negotiations Bulletin* 9.

¹³⁸ Nagoya Protocol, Arts 5–6.

¹³⁹ *Ibid.*, Arts 15–16 and 18.

¹⁴⁰ Report of the First Meeting of the Open-Ended Ad Hoc Intergovernmental Committee for the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization, UN Doc. UNEP/CBD/ICNP/1/8 (2011).

¹⁴¹ Nagoya Protocol Art 12.1.

¹⁴² A tool promoted by Natural Justice, a legal NGO working with the Bushbuckridge traditional healers in South Africa, the Raika pastoralists in India, and the Samburu pastoralists in Kenya.

¹⁴³ United Nations Environment Programme (UNEP), Community Protocols for ABS (UNEP, undated), available at : www.unep.org/communityprotocols/index.asp.

¹⁴⁴ Jonas, Bavikatte, and Shrumm, 'Community Protocols and Access and Benefit-Sharing', 12 *Asian Biotechnology and Development Rev* (2010) 49, at 62.

product of international and transnational networks of experts comprising state and non-state entities: they have already been developed through the involvement of networks of NGOs, intergovernmental organizations (the UN Environment Programme), and bilateral donors, as well as the private sector,¹⁴⁵ with a view to preparing communities before engaging in contractual negotiations with bioprospectors. The Nagoya Protocol specifically recognizes this innovative instrument and requires states parties to support as appropriate their development by indigenous and local communities.¹⁴⁶

It is not far-fetched to assume that both the EU¹⁴⁷ and the US¹⁴⁸ will engage in bilateral initiatives with a view to supporting the implementation of the Nagoya Protocol in third countries, possibly through a mix of trade and aid measures. Within and beyond the framework of the Nagoya Protocol, therefore, we could witness an ever greater evolution of bilateralism: while traditional bilateralism was concerned only with the treatment of one state's own national abroad,¹⁴⁹ bilateralism in the service of the effective implementation of the Nagoya Protocol will rather concern itself with the treatment of communities of third countries' nationals in those third countries. Such bilateral initiatives will present even more complex risks relating to their support for multilateralism because of the significance of common but differentiated responsibility under the Protocol, and the sheer amount of financial and technical assistance needed to support developing country parties in facing unprecedented compliance challenges. Indeed, the Nagoya Protocol includes several references to the capacity needs and priorities of developing countries and of indigenous and local communities, in recognition of their role in implementing the Protocol and their specific needs and rights that may differ from those of the state in which they reside, as well as other stakeholders such as NGOs and the private sector.¹⁵⁰

¹⁴⁵ See the UNEP website on community protocols case studies, available at: www.unep.org/communityprotocols/casestudies.asp; and the website of a coalition of different actors on community protocols, available at: www.community-protocols.org/.

¹⁴⁶ Jonas, Bavikatte, and Shrumm, *supra* note 143, at 68.

¹⁴⁷ Council, 'Conclusions on Convention on Biological Diversity: Follow-up to Nagoya Conference', 20 Dec. 2010. See also Morgera, 'The Trajectory of EU Biodiversity Cooperation: Supporting Environmental Multilateralism through EU External Action', in E. Morgera (ed.), *supra* note 98. Certain EU bilateral agreements already contain clauses on cooperation on ABS: EU-OPE FTA, *supra* note 99, Art. 272.

¹⁴⁸ US-Peru FTA, *supra* note 93, Art. 18.11: Jinnah, *supra* note 96, at 209, refers to this provision as a 'nursery for the development of CBD norms and principles within a US policy context'.

¹⁴⁹ Simma, *supra* note *, at 243.

¹⁵⁰ The Nagoya Protocol indeed addresses in a lengthy provision (Art. 22) the paramount importance of capacity-building, making specific reference to existing global, regional, subregional, and national institutions and organizations that may be involved in international cooperation on capacity building. So, the proposed approach to ABS capacity-building cooperation – that is, country-driven, mindful of financial solidarity obligations under the CBD, and with the involvement of indigenous and local communities and other stakeholder in accordance with Nagoya Protocol Art. 12(3) and (1) – is expected to be reflected also in unilateral and bilateral development assistance.

Supporting the development of access and benefit-sharing laws in developing countries will occur not only in the interest of the international community in the effective implementation of the Protocol, but also in developed countries' own interest (to ensure predictability and fairness for their users), while avoiding any undue influence or pressure on provider countries' exercise of their national sovereignty over their genetic resources and on indigenous and local communities. The delicate, and in many respects still open-ended, balance of international obligations enshrined in the Nagoya Protocol will thus create both opportunities for bilateral initiatives to contribute to effective implementation as a single best effort, and risks that these initiatives will undermine the unprecedented form of partnership between user and provider countries under the Protocol.¹⁵¹

4 Conclusions: Analysing Bilateralism through the Lens of Global Environmental Law

A *nouvelle vague* of bilateralism is emerging: enforcement of multilateral environmental agreements as a single-best-effort global public good is not necessarily seen as an alternative to 'non-existent or ineffective multilateral enforcement',¹⁵² but rather as complementing existing and effective compliance mechanisms (such as that under CITES) that aim to deliver the same global public good through an aggregate effort. The choice is therefore no longer between unilateralism, multilateralism, or 'doing nothing',¹⁵³ but rather between a wider array of more or less collaborative forms of mini-lateral support for multilateralism. The shift is quite clear in the context of CITES, and more recent international environmental agreements, such as the Nagoya Protocol, may provide even more challenging avenues for bilateralism to serve the interests of the international community within an intricate web of different legal orders.

The shift towards bilateralism may be explained by the intent to ensure compatibility with the law of the World Trade Organization in light of the *Shrimp–Turtle* case.¹⁵⁴ Even in that light, however, the analysis need not be limited to the form in which single-best effort

¹⁵¹ Although CBD developed-country Parties have mostly characterized themselves as user countries and developing ones as provider countries, '[p]arties that are countries of origin of genetic resources may be both users and providers and that Parties that have acquired these genetic resources in accordance with the Convention on Biological Diversity may also be both users and providers' (CBD Decision VII/19 D, recital 16).

¹⁵² Bodansky, *supra* note 53, at 346.

¹⁵³ Bodansky, *The Art and Craft of International Environmental Law* (2010), at 237.

¹⁵⁴ WTO Appellate Body report, "United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia", 22 Oct. 2001, WT/DS58/AB/RW. It was found that the US's (unsuccessful) bilateral negotiations with countries targeted by its environmental trade restrictions were relevant for determining the WTO law compatibility of the measure (the point is made by Kulovesi in Kulovesi, Morgera, and Munoz, 'Environmental integration and multi-faceted international dimensions of EU law: Unpacking the EU's 2009 climate and energy package', 48 *CMLRev* (2011) 829, at 885).

global public goods are supplied: bilateral initiatives may still be largely dominated by one party in particular, which imposes its interpretation of international agreements and of the findings of compliance mechanisms. The distinct US and EU approaches (the one sanction-based, the other incentive-based) to bilateral initiatives and their different selections of relevant multilateral environmental agreements¹⁵⁵ certainly speak of their *de facto* dominant position in their partnership with other states, based on the partner countries' dependence on market access to the EU or US – possibly to the point of accepting 'deep regulatory intrusion'.¹⁵⁶ A certain degree of unilateralism may thus still be detected in bilateral initiatives. In addition, the analysis should be broadened to the network of national laws underpinning certain bilateral efforts, and include the question whether the combination of the two approaches actually results in 'contingent unilateralism' rather than true bilateralism.¹⁵⁷ Equally, unilateral initiatives are now becoming injected with some elements of bilateralism: for instance, the EU Generalized System of Preferences, in assessing whether beneficiary countries support the effective implementation of selected multilateral environmental agreements,¹⁵⁸ uses 'dialogues' where shortcomings in implementation can be jointly discussed with beneficiary countries on an ongoing basis, rather than only relying on a unilateral determination by the European Commission.¹⁵⁹

Does the new wave of bilateralism truly serve community interests? It remains to be seen on a case-by-case basis whether the return to bilateralism¹⁶⁰ actually serves the priorities established at the multilateral level by the international community, or rather the hidden,

¹⁵⁵ As opposed to the core multilateral agreements listed in EU bilateral agreements (*supra* note 99), the US–Peru, FTA, *supra* note 93 (Annex 18.2) includes: the 1987 Protocol relating to the International Convention on the Prevention of Pollution from Ships, 17 Feb. 1978, 1340 UNTS 61; the Convention on Wetlands of International Importance, 2 Feb. 1971, 996 UNTS 245; the Convention on the Conservation of Antarctic Living Marine Resources, 20 May 1980, 1329 UNTS 47; the International Convention on the Regulation of Whaling, 2 Dec. 1946, 161 UNTS 74; and the Convention for the Establishment of an Inter-American Tropical Tuna Commission, 31 May 1949, 80 UNTS 3. Only CITES and the Montreal Protocol are common to both lists.

¹⁵⁶ Jinnah, *supra* note 96, at 210.

¹⁵⁷ This argument has been made with reference to bilateral agreements on sustainable biofuel production promoted by the EU through its own renewable energy regulation: Scott, 'The Multi-level Governance of Climate Change', 4 *Carbon and Climate L Rev* (2011) 25. For a discussion on links between internal regulation, bilateral and multilateral initiatives see Marin Duran and Morgera, *supra* note 118, at ch. 7.

¹⁵⁸ *Ibid.*, at ch. 3; Switzer, 'Environmental Protection and the Generalised System of Preferences: a Legal and Appropriate Linkage?', 57 *ICLQ* (2008) 113.

¹⁵⁹ It appears that in the context of 'GSP+dialogues', the Commission can raise any issues relating to the effective implementation of selected multilateral environmental agreements, indicate shortcomings in implementation, provide time for reaction, and encourage third parties to cooperate with the agreements' monitoring bodies: Zvelc, *supra* note 98. Zvelc also emphasizes that further elements of bilateralism are proposed for the revision of the GSP, such as third party direct involvement in monitoring their own compliance with the multilateral environmental agreements: European Commission, Proposal for a Regulation of the European Parliament and Council Applying a Scheme of Generalized Tariff Preferences', COM(2011)241, Art. 15(2).

¹⁶⁰ At the origins of international environment law, a 'movement from bilateralism to community concerns in international law' had been witnessed: Simma, *supra* note *, at 238.

more egoistic agenda of individual states' own 'parochial national interests',¹⁶¹ thus undermining the 'higher unity' of the international community.¹⁶² Such a hidden agenda could comprise competitive interests¹⁶³ or the desire to make one country's interpretation of international law or priorities in ongoing multilateral negotiations prevail.¹⁶⁴ More realistically, one can take for granted that bilateralism involves an inevitably mixed agenda that should then be evaluated on the basis of the balance achieved between the protection of the interests of the international community and the interests of individual states in the light of implications at the multilateral level,¹⁶⁵ but also at the national and local level.

Ultimately the legitimacy of single-best-effort global public goods rests on international law both as substance and process.¹⁶⁶ Multilateral treaties remain the 'indispensable tool for fostering community interests',¹⁶⁷ also beyond multilateral frameworks. Good faith and dialogue are also essential ingredients for cooperation, within and beyond multilateral frameworks, based on the respect for sovereign equality among partner countries,¹⁶⁸ and they become particularly relevant when countries partnering each other in supplying single-best-effort global public goods have differentiated responsibility. Legitimacy, in addition, depends not only on reliance on multilateral norms but also on multilateral institutions,¹⁶⁹ such as compliance mechanisms, that are essential to the effective promotion and protection of the international community's interests. Reliance on international institutions may thus contribute to dispelling the 'danger of abuse' by individual states or groups of states based on lack of objectivity and evenhandedness in the pursuit of community interests.¹⁷⁰ The legitimacy of single-best-effort global public goods further rests on continued responsiveness to intervening developments within the multilateral framework,

¹⁶¹ Bodansky, *supra* note 53, at 345.

¹⁶² *Ibid.*, at 245.

¹⁶³ That is the desire to 'ensure a level playing field between regional partners with regard to environmental standards': Marín Durán, 'The Role of the EU in Shaping the Trade and Environment Regulatory Nexus: Multilateral and Regional Approaches', in B. Van Vooren, S. Blockmans, and J. Wouters (eds), *The Legal Dimension of Global Governance: What Role for the EU?* (forthcoming 2012).

¹⁶⁴ Marín Durán, 'Environmental Integration in EU Development Cooperation: Responding to International Commitments or Its Own Policy Priorities?', in Morgera (ed), *supra* note 98; Marín Durán and Morgera, *supra* note 118, at ch. 5. Note, for instance, that the European Commission makes it clear that its external funding for the environment aims, *inter alia*, to see international environmental governance 'shaped by the external dimensions of the EU's environment and climate change policies': European Commission, 'Environment and natural resources thematic programme – 2011–2013 strategy paper and multiannual indicative programme', 29 Oct. 2010, at 25.

¹⁶⁵ Villalpando, *supra* note 29, at 415 and 418–419.

¹⁶⁶ Boisson de Chazournes, *supra* note 52, at 325, 329, and 338; on the need for substantive and procedural lawfulness of unauthorized unilateral actions see also Reisman, *supra* note 61, at 3–4.

¹⁶⁷ Simma, *supra* note *, at 324.

¹⁶⁸ Dupuy, *supra* note 63, at 22–23.

¹⁶⁹ Simma, *supra* note *, at 285 and 338–340.

¹⁷⁰ *Ibid.*, at 319.

including the determinations by multilateral environmental agreements' governing and compliance bodies relating to the link between financial solidarity, capacity building, and compliance.¹⁷¹

Not only is the global public goods literature useful in understanding developments in international environmental law, but international environmental law can challenge the assumptions of the global public goods literature. In particular, common but differentiated responsibility emerges both as a justification for countries to take the lead and supply single-best-effort global public goods in support of multilateralism, in the face of flaws or delays in multilateralism, but also – equally significantly – as a substantive limitation for bilateral initiatives not to undermine multilateral determinations relating to financial and technical solidarity. To that end, therefore, the analysis needs to transcend the trade and environment debate and also fully take on board the aid and environment link as an essential element for assessing the degree of legitimacy in bilateral relations: attempts to support multilateralism through bilateral initiatives based on trade sanctions or trade incentives beyond the capacities of partner countries are to be balanced with appropriate and equitable transfers of finance and/or technology at the bilateral level. This seems particularly timely as the 'paradoxical' trend of voluntary financing and technology transfer under the international law of cooperation¹⁷² is increasingly challenged at the multilateral level: in the context of the international biodiversity regime, for instance, detailed guidelines are being elaborated on financial solidarity and incipient forms of multilateral monitoring of international solidarity obligations are being considered.¹⁷³ In that regard, common but differentiated responsibility serves as the ultimate test for the legitimacy of supplying a global public good through single best efforts, making sure these truly reinforce – rather than undermine – multilateral cooperation as an aggregate-efforts global public good.

Finally, global environmental law may offer a particularly useful approach to the study of bilateral and other single-best-effort initiatives as a building block, rather than a stumbling block, towards effective multilateralism, by drawing attention to the interactions between international, national, local, and transnational law, and the different roles of states,

¹⁷¹ Morgera, 'Ambition, Complexity and Legitimacy of Pursuing Mutual Supportiveness through the EU's External Environmental Action', in Van Vooren, Blockmans, and Wouters, *supra* note 162.

¹⁷² Abi-Saab, *supra* note 37, at 263.

¹⁷³ For a discussion in the context of the CBD see Morgera and Tsioumani, 'Yesterday, Today and Tomorrow: Looking Afresh at the Convention on Biological Diversity', (2011) YbIEL, available at: <http://yielaw.oxfordjournals.org/content/early/2011/11/10/yiel.yvr003.full.pdf+html>, at 25–29. Note that in the global public goods literature, compliance with funding obligations increases if there is a way to verify which countries have paid their dues even in the absence of an explicit enforcement mechanism, particularly when underlying decisions have been taken by consensus: Barrett, *supra* note 31, at 123.

non-state actors, and international bodies such as compliance mechanisms. Comparative analysis would be particularly useful to illuminate whether and to what extent the differences in the EU's and US's bilateral initiatives affect the implementation of international environmental law in certain countries through national law, and in parallel their implications within the relevant multilateral frameworks.¹⁷⁴ Further study of the supply of aggregate-efforts and single-best-effort global public goods from the viewpoint of global environmental law is thus needed in order to clarify how different norms, institutional links, and approaches that thrive on the plurality of legal orders are affecting the pursuit of the international community's interests.

¹⁷⁴ The realm of environmental law appears a particularly fruitful ground for research on the interactions between domestic and international law, as well as implications for state and non-state actors, as highlighted by Ellis, *supra* note 11, at 952.